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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF MARTIN DRAIN AND BRANCHES DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

Petitioners,

vs.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, A PUBLIC QUASI CORPORATION OF MACOMB COUNTY, MICHIGAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAYMOND J. DYKEMA,
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Counsel for Petitioners.

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KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF MARTIN DRAIN AND BRANCHES DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

Petitioners (Appellees Below),

vs.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, A PUBLIC QUASI CORPORATION OF MACOMB COUNTY, MICHIGAN; COUNTY OF MACOMB; CARL B. BRANDENBURG, COUNTY TREASURER; GUY L. BROWN, COUNTY CLERK; BERT ENGELBRECHT, DRAIN COMMISSIONER; SHERWOOD BENNETT, CONTROLLER; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF ERIN; TOWNSHIP OF LAKE; TOWNSHIP OF WARREN; AND ROY F. STOCKWELL, TOWNSHIP TREASURER OF LAKE TOWNSHIP,

Respondents (Appellants Below).

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Ap-

peals for the Sixth Circuit entered March 14, 1941, reversing a judgment of the District Court of the United States for the Southern District of Michigan entered September 15, 1939.

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record.)

Opinions Below.

The opinion of the District Court (168) confirms a master's report (98). The opinion of the Circuit of Appeals (643) was rendered March 14, 1941.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

Judgment of the Circuit Court of Appeals was entered March 14, 1941. Petition for rehearing was filed April 9, 1941 (657), and denied May 9, 1941 (672), without opinion. Issuance of mandate was stayed by order of that court dated May 15, 1941, for thirty days, pending the application for writ of certiorari in this court.

Summary Statement.

The suit in general involves the question of the right of petitioners, and others of the class for whom suit was brought, to enforce an issue of bonds, of which $1,193,000.00 are still outstanding, issued by the Martin Drain and Branches Drain District of Macomb County, Michigan.

In Michigan, drain proceedings are conducted by a County officer, the Drain Commissioner, under authority of a law from which we have copied applicable provisions in the appendix (p. 1). The proceedings are instituted by a petition of land owners for the creation of a taxing district,

followed by a petition for the location and establishment of a drain within the district. A finding of necessity must be made by an independent tribunal convened by the County Probate Court. Assessments to defray construction costs are levied against lands in the district, and may also be levied against the state, county and townships for benefits to roads and other public property. Such assessments may be divided into annual installments, and bonds may be issued in anticipation of the collection thereof. Authority is given to drain districts to issue bonds by Article VIII, Section 15(a) of the State Constitution, which provides: "Any drainage district established under provisions of law may issue bonds for drainage purposes within such district," and by Section 15, Chapter X, of the Drain Law (p. 11 Appendix). Taxes are collected, and if delinquent, enforced as general property taxes through the regular collection and enforcement agencies. Notice by publication, and in some instances personal service, is given of each important step in the proceedings. A review of any question involving any step in the proceedings is provided by certiorari, which must be taken within ten days after the final order of determination, the last step in the proceedings except the issuance of bonds, letting of contracts and confirmation of assessment roll. An appeal from assessment may also be taken within ten days after confirmation of the roll. Except for certiorari and appeal, the statute forbids any other attack on the proceedings, the legality of the drain, or taxes levied therefor. As taxes are collected they are placed in a bond redemption fund in the County treasury, and can be used only to service the bonds. Under some conditions the County is obliged to advance moneys to the redemption fund in case of deficiency, to be reimbursed by later collections of drain taxes. If the amount originally levied is insufficient to pay the cost of the drain and bonds that have been issued, an additional levy is re-

quired. No prescribed form of drain is required, nor is it restricted to storm water. Cities, villages and townships may use it for sewage disposal, and sewage disposal and purification plants may be built in connection with it.

The bonds in question were issued in proceedings strictly conforming to the Drain Law (624), and were sold by the district to an investment house at par and accrued interest (638). The investment house almost immediately resold them to the public. With the money received the officers built the drain, which now has been in use for over twelve years. Until June 1, 1931, maturing interest has been met, and $190,000.00 principal amount of bonds of the district paid. Tax collections were made and a substantial surplus in the bond redemption fund accumulated. In December, 1931, County officers suspended interest payments, and the following year suspended tax collections. Objection to payment of the bonds and levy of taxes is based upon the claim that the improvement was designed and built with the intention that it should serve the dual purpose of removing surface water and sanitary sewage, and that because of this underlying purpose the Drain Commissioner lacked jurisdiction. The proceedings, however, disclosed no purpose other than drainage, and the improvement contains no appurtenances or features intended for sanitary sewerage (384). It is an underground conduit with numerous inlets for the reception of surface water, and of sufficient capacity to transport surface water in times of heavy storms.

The bonds contain recitals (22) that they were issued for the building of the named drain, compliance with the drainage laws specified, and the due happening, existence and performance of all conditions precedent to make them legal and binding obligations.

Petitioners filed their bill (1) in the District Court, alleging the following: Facts necessary to confer jurisdiction on the District Court by reason of diverse citizenship, the

proceedings for the building of the drain, the issuance and good faith purchase of the bonds, default and refusal to pay, and refusal to levy taxes. Foundation for an injunction to restrain the diversion of the drain fund was laid by allegations that various taxpayers had sued either to get possession of the fund, or to restrain the levy of further taxes against them or their lands. It appeared from this that in one suit commenced by Erin Township August 22, 1932, a decree had been entered September 16, 1932, against the County of Macomb, its Board of Supervisors, Drain Commissioner and Treasurer, restraining them from levying any taxes against the Township. The decree appears as an exhibit to the bill (27). The only reason appearing for the entry of decree, so far as the record shows, is that the Macomb County Circuit Court accepted the Township's claim that the taxes were void because the drain was not an open ditch (13). Neither pleadings nor opinion of the State Court in the Township's case appear elsewhere in the record. The relief prayed by bondholders in this case was a decree establishing the bonds as valid obligations, mandatory injunction compelling the levy of taxes, maintenance of sinking funds, restoration of diverted moneys, accounting and payment of bonds from sinking fund or the County's general fund. The bill also asked that the Township of Erin be restrained from using the decree it had obtained to impede the collection of taxes. Respondents' answers consist of a denial of the validity of the bonds and taxes on the ground that the improvement was not a drain, and assert that by reason of that fact no rights accrued to bondholders.

The District Court made a limited order of reference to the Standing Master in Chancery who determined (81-88)—(a) all bonds were held by *bona fide* holders for value or by those succeeding to their rights, (b) present holders are entitled to rely on the truth of the recitals in the bonds,

(c) defendants were estopped to deny the truth of the recitals.

While decree for the plaintiffs was being settled in the District Court, the Circuit Court of Appeals decided *Royal Oak Drain District* v. *Keefe*, 87 F. (2d) 786, and the District Court decided that because of a certain statement in the opinion in that case, it would be advisable to refer the case (97) to a Special Master to determine the primary purpose and character of the project and to settle the terms of the decree.

The Master took testimony (201, *et seq.*) in accordance with the previous orders of reference and filed a complete report (98-153). The Master in his report concluded that the improvement was illegal in the light of certain Michigan court decisions, but that inasmuch as the bonds contained recitals importing compliance with the law and proper performance of all conditions precedent, they were valid in the hands of present holders, and that the recitals were valid under Michigan law (134). He held that the State Court decree obtained by Erin Township was not *res judicata* against bondholders, since they were not parties to the record in that case, and under Michigan law which he cited the decree could not operate against them (101). He further held that there was no obligation on bondholders' part to intervene in the taxpayers' suit (102). Exceptions to the report were taken by defendants (154) on the ground that the Master should not have held that the Court had jurisdiction, should not have found that bondholders occupied the position of good faith holders, and should not have applied the estoppel rule. No exception was taken on the ground that he should have held the State Court decrees binding to any extent upon bondholders. Plaintiffs excepted (163) to the finding that the improvement was illegal. The court overruled all exceptions (171) except one relating to the amount of diversion from

the fund, and filed a short opinion declaring his view that the bondholders were entitled to recover because of defendants' estoppel to plead the falsity of the bond recitals (168). A judgment was entered substantially as prayed (172), which declared the bonds valid, directed officers to levy and collect taxes, to maintain sinking funds, directed the County to restore diversions and to advance its general funds for the payment of bonds and interest past due under statutory limitations. It also restrained Erin Township from using the decree obtained in the State Court to prevent officers from making tax levies. The principal defendants then appealed to the Circuit Court of Appeals, which, as noted above, reversed the judgment.

The opinion of the Circuit Court of Appeals (643) agrees with the District Court in its conclusion that it had jurisdiction, that bonds are held *bona fide*, and that the projects are illegal under Michigan law. It refuses to consider a decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170, holding that a Michigan Drain Commissioner has power to build drains for the removal of both storm water and sewage, holds that parties other than the drain districts are not obliged to recognize the bonds as legal, that the districts are not estopped by their bond recitals, and that the decree in the taxpayers' suit is *res judicata* against bondholders. The latter is not stated as an independent ground for reversal, but appears to be interwoven into the court's entire process of reasoning. It is embodied in the question which the court says it has for decision (649), "Whether when the Michigan courts have held that these particular projects and all proceedings thereunder are void, the recitals in the bonds estop appellants, etc." The court had before it another issue which petitioners believe should have been considered in support of the judgment, *i. e.*, the binding effect of the statutory provision forbidding collateral attack on drain

proceedings, which petitioners believe was not considered because of the court's view that the bondholders were barred by a prior adjudication.

Questions Presented by This Petition.

The fundamental questions presented are:

1. Whether due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States has been denied petitioners, and other holders of these bonds, in deciding that a decree in a suit brought by Erin Township, a taxpayer in the drain district, against the Drain Commissioner and others, to which suit no bondholders were parties, was *res judicata* of issues relating to the validity of the bonds and remedies thereon, on the theory that the Drain Commissioner represented bondholders, so that all matters decided in such prior suit, or which might have been decided therein, were adjudications against bondholders.

2. Whether in applying the law of the State of Michigan a Federal Court is not bound by the entire body of such law contained in the statutes and court decisions, under such rules of interpretation and construction as the Court of last resort of the State would be obliged to follow. Subsidiary to this question are the following:

(a) Whether when the State Court of last resort has by its last decision declared the powers of drain districts to build drainage improvements of a particular character, the Federal Courts can reject such decision on the ground that it involved a different drainage improvement.

(b) Whether when a State Court of last resort has rendered decisions holding that a municipal corporation is estopped against *bona fide* holders of its bonds to plead that the bonds are issued for a purpose different than that which is recited in the bonds, such deci-

sions can be rejected in the absence of a clear showing that such decisions have been overruled.

(c) Whether public officers and other public bodies charged with the duty of performing acts necessary to provide funds for the payment of municipal bonds are excused from performing such acts when liability of the issuing municipality rests upon estoppel.

(d) Whether when a State statute provides that there may be no collateral attack on proceedings for the construction of a drain, and decisions in force when bonds for such drain were issued interpret such statute to forbid collateral attack except where proceedings violate the Constitution, such decisions can be rejected, it being the law of the State that rights which accrue under a statute as judicially interpreted must be judged in accordance with the same interpretation.

(e) Whether when the State law provides that moneys collected from drain taxpayers shall be used only for the purpose of paying bonds, and denies the right of taxpayers to recover the same, the money so collected and in the possession of the county as statutory custodian of the fund can be withheld from bondholders.

3. Whether the lower court has not rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, in *Fetzer* v. *Johnson*, 15 F. (2d) 145, and in conflict with the decision of this court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431, in refusing to enjoin a party who has obtained a decree or judgment in another court from enforcing it in a manner inimical to the rights of parties not bound thereby.

Reasons Relied Upon for Allowance of Writ.

1. The United States Circuit Court of Appeals, Sixth Circuit, has decided an important question of federal law, probably in conflict with the Fifth Amendment to the Con-

stitution of the United States, and in conflict with the decision of this court in *Hansberry* v. *Lee,* 311 U. S. 32, 61 Sup. Ct. 115.

2. The United States Circuit Court of Appeals, Sixth Circuit has decided important questions of local law, probably in conflict with local statutes and decisions in the following respects:

(a) It has decided that Martin Drain and Branches Drain is an illegal structure, in the absence of any violation of the Drain Law by the officers who designed and built it, and contrary to the interpretations of such law by the local court of last resort in *Kennedy* v. *Dingman,* 272 Mich. 24, and *Detroit Trust Co.* v. *Dingman,* 291 Mich. 170.

(b) It has decided that a municipality which issues its bonds, reciting therein that the same are issued for a purpose which the law authorizes, is not estopped against *bona fide* holders of said bonds to plead the falsity of its recitals, which decision is in conflict with local decisons as follows: *Common Council* v. *Schlich,* 81 Mich. 405; *Thompson* v. *Village of Mecosta,* 127 Mich. 522; *Schmid* v. *Village of Frankfort,* 131 Mich. 197; *Bates* v. *City of Hastings,* 145 Mich. 574, and *Baker, et al.,* v. *Ruddiman* #3 *Drain District, et al.,* unreported decision of United States District Court, Western District of Michigan, Southern Division.

(c) It has decided that public officers charged with the duty of levying and collecting taxes, maintaining sinking funds for the payment of drain district bonds, and the county charged with the duty of making temporary advancement of moneys in case of drain fund deficiencies, are not obliged to perform such duties when the validity of the bonds rests upon the estoppel of drain districts, its decision in this respect being without statutory warrant and contrary to general law.

(d) It has ignored and failed to give effect to Section 11, Chapter VI, of the Drain Law, Act 316, Public Acts

of Michigan of 1923, as amended by Act 331, Public Acts of Michigan of 1927, Section 4902, Michigan Compiled Laws 1929 (see Appendix, p. 8), the material part of which reads as follows: "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." It has failed to give effect to interpretations of this statute holding that collateral attack on the drain proceedings and taxes therefor is forbidden, contained in *Township of Clarence* v. *Dickinson*, 151 Mich. 270, and *Stellwagen* v. *Dingman*, 229 Mich. 159, and disregarded local decisions holding that judicial interpretations under which rights accrue must continue to be applied to such rights notwithstanding subsequent inconsistent decisions, *i. e.*, *Pittsburgh, etc., Iron Co.* v. *L. S. Iron Co.*, 118 Mich. 109, and *Donohue* v. *Russell*, 264 Mich. 217.

(e) It has ignored and failed to give effect to Section 16, Chapter X, of the Drain Law, Act 316, Michigan Public Acts 1923, as amended by Act 331, Michigan Public Acts 1927, Section 4938, Michigan Compiled Laws 1929, (see Appendix, p. 13), the material part of which reads as follows: "All of said installments (of drain taxes) and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of said drain, to be used solely for the payment of bonds as the same shall mature," and it has failed to give effect to Section 5, Chapter X, of said Drain Law, Act 316, Michigan Public Acts of 1923, Section 4927, Michigan Compiled Laws 1929, (see Appendix, p. 10), the material portion of which reads as follows: "No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty (30) days from the time of payment of such money to, or sale of such property by, the collecting officer," and it has ignored and failed to give effect to the construction of said statute as contained in *Township of Norton* v. *Cockerill*, 265 Mich. 405, *Brooks* v. *Oakland County*, 268 Mich. 637.

3. The United States Court of Appeals, Sixth Circuit, has decided important questions as to powers of Federal Courts to restrain action to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer* v. *Johnson*, 15 F. (2d) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431.

4. The Supreme Court of Michigan now has before it a case which we believe will determine the view of the State Court as to whether bonds containing similar recitals to those here involved are valid in the hands of good faith holders. City of Highland Park and other holders of bonds of another drain district, Royal Oak No. 7 Storm Sewer Drain District, have petitioned the court to issue a writ of mandamus to compel the Drain Commissioner of Oakland County, Michigan, and the Board of Supervisors of such County, to levy and spread drain taxes for such drain. *City of Highland Park, et al.*, v. *Clark, et al.*, No. 41690, Michigan Supreme Court. Respondents have pleaded that they should not be compelled to do so because, as they allege, the project is a sewer and was so held to be in *Village of Oak Park* v. *Van Wagoner*, 271 Mich. 450. Thus the same issue as was considered by the Circuit Court of Appeals will in all probability be decided within a few months, and will definitely determine the local law on the subject. Petitioners, therefore, believe that if this Court has any hesitancy to issue the writ of certiorari in this case, it should defer action until the State Court of last resort has decided the pending action.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for

its review and determination, as provided by the statutes of the United States, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8583, Martin Drain and Branches Drain District, et al., Appellants, *v.* Kenneth M. Keefe, et al., Appellees," and that the judgment therein of said Court of Appeals be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to the court may seem just and proper.

Dated: July 19, 1941.

KENNETH M. KEEFE,
ERNEST E. QUANTRELL and
PELHAM C. WILMERDING,
Petitioners.

By DAVID M. WOOD and
RAYMOND J. DYKEMA,
Attorneys for Petitioners.